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No. 81-_____

In The

Supreme Court of the United States

October Term, 1981

THE STATE OF MONTANA, et al.,

Petitioners,

vs.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the disclaimer provisions in Montana's Enabling Act and Constitution deprive the Montana state courts of jurisdiction to adjudicate Indian and other federal reserved water rights?

2. Do the Montana state courts have jurisdiction to adjudicate Indian and other federal reserved water rights under the McCarran Amendment, when there has been no compliance with the procedures established in 25 U. S. C. § 1322?

3. Did the Montana District Court correctly hold that considerations of "wise judicial administration" require adjudication of all water rights in Montana's comprehensive adjudication proceedings rather than in piecemeal federal actions?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, the State of Montana and hundreds of private Petitioners, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 22, 1982, and clarified on April 5, 1982.

Each petitioner was a party to one or more of the cases decided by the Ninth Circuit in *Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation v. Adsit*, 668 F. 2d 1080 (February 22, 1982).[1] The respond-

[1]The petitioners in addition to the State of Montana are listed in Appendix A, *infra*. The statement required by Rule 28.1 of the Rules of the Supreme Court of the United States appears in Appendix B, *infra*.

ents are: the United States of America, the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, the Crow Tribe of Indians, the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation and James Bowen, all appellants in the Ninth Circuit cases consolidated with *Adsit*.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 668 F. 2d 1080 (1982). The subsequent clarifying order has not yet been reported. The opinion and clarifying order are reproduced in Appendices C and D. The opinion of the United States District Court for the District of Montana, issued by Judges Battin and Hatfield, 484 F. Supp. 31 (D. Mont. 1979) appears in Appendix E.

JURISDICTION

The judgment of the Court of appeals for the Ninth Circuit was entered on February 22, 1982, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under the provisions of 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

The Enabling Act of Montana of February 22, 1889, 25 Stat. 676, which in pertinent part provides:

> An Act • • • to enable the people of • • • Montana • • • to be admitted into the Union on an equal footing with the original states • • • § 4. • • • Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; • • •

Montana Constitution, Ordinance No. I (1889) which states in pertinent part:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, • • •

Montana Constitution, Article I (1972), which states:

> All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.

Montana Constitution, Article IX, Section 3 (1972), which states in pertinent part:

> Water rights. (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
>
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

The McCarran Amendment, Act of July 10, 1952, 66 Stat. 560, 43 U. S. C. Section 666, which states:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances:

Provided, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1322, Public Law 280, which states:

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the Tribe occupying the particular Indian country or part thereof which would be affected by

such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. Section 1324, Public Law 280, which states:

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

The following statutes are reproduced in the Appendix:

Montana Water Use Act, Laws of Montana (1973), Chapter 452 (App. F);

Senate Bill 76, Laws of Montana (1979), Chapter 697 (App. G).

STATEMENT OF THE CASE

This case involves the question of whether the United States District Court for the District of Montana properly exercised its discretion in dismissing seven different complaints seeking to have the federal courts adjudicate water rights on and in the vicinity of Montana's seven Indian reservations. The complaints included Indian and other federal reserved water rights, as well as the water rights of the State of Montana and thousands of other parties.

The seven cases were filed over a period of approximately four years. The first was filed by the Northern Cheyenne Tribe on January 30, 1975,[1] after the Montana Department of Natural Resources and Conservation commenced state court proceedings to determine existing water rights in the area of the Reservation pursuant to Montana's Water Use Act of 1973 (App. F). Approximately

[1] *Northern Cheyenne Indian Tribe of the Northern Cheyenne Indian Reservation v. Tongue River Water Users Association, et al.*, No. CV-75-6-BLG, CA-79-4887.

two months later, the United States filed two other complaints in federal district court.[3]

Pending these first three actions, this Court decided the case of *Colorado River Water Conservation District v. United States*, 424 U. S. 800 (1976), holding that water adjudication proceedings in Colorado state courts could include all federal reserved water rights, including Indian reserved water rights, pursuant to the McCarran Amendment, 43 U. S. C. § 666. Also pending decision in these first three cases, the Montana legislature enacted amendments to Montana's Water Use Act by passing "Senate Bill 76" (App. G). These amendments required immediate state-wide adjudication of all existing water rights, including those reserved by the United States for itself and for the benefit of Indians and Indian Tribes. On April 5, 1979, approximately one month before that legislation became effective, the United States Attorney for the District of Montana filed four additional suits in federal court.[4] Like the three earlier cases, these actions sought federal court adjudication of various water rights, including Indian and other federal reserved water rights, and the rights of these petitioners.

On November 26, 1979, District Judges Battin and Hatfield granted motions to dismiss all seven cases holding

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[3] *United States v. Tongue River Water Users Association, et al.*, No. CV-75-20-BLG, CA-80-3040, 80-3041, 80-3042; and *United States v. Big Horn Low Line Canal, et al.*, No. CV-75-34-BLG, CA-80-3062, 80-3063.

[4] *United States v. Aasheim, et al.*, No. CV-79-40-BLG, CA-80-3028, 80-3061; *United States v. Aageson, et al.*, No. CV-79-21-GF, CA-80-3032, 80-3044; *United States v. AMS Ranch, Inc., et al.*, No. CV-79-22-GF, CA-80-3045; and *United States v. Abell, et al.*, No. CV-79-33-M, CA-80-3036.

that considerations of "wise judicial administration" justified dismissal in favor of the more comprehensive on-going state court proceedings under Montana's Water Use Act. The District Court's Order (App. E) was appealed by the United States and the Indian Tribes who participated in the District Court proceedings. The Ninth Circuit Court of Appeals consolidated the appeals for review. The Ninth Circuit reversed the district court's dismissal of the complaints, holding that Indian water rights must be adjudicated in the federal courts and that the State of Montana lacked jurisdiction to adjudicate the Indian water rights. The court of appeals held that it was not "wise judicial administration" for the federal district courts to dismiss these cases, and that the state courts lacked jurisdiction over Indian water rights because Montana's Enabling Act and Constitution disclaimed jurisdiction over the Indian Water rights and because Montana had failed to assume jurisdiction over these rights pursuant to Public Law 280, 25 U. S. C. § 1322.

Although the complaints filed by the United States included non-Indian federal reserved water rights, the Ninth Circuit opinion was completely silent on the question of whether or not the district court properly dismissed those claims in deference to Montana's state court water adjudication proceedings.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's opinion on the effect of Montana's disclaimer provisions conflicts with decisions of this Court, and the decision of the Tenth Circuit in Jicarilla Apache Tribe v. United States.

This case involves the question of whether or not the courts of the State of Montana have jurisdiction to ad-

judicate federal water rights, including Indian water rights which the United States holds in trust for the various Indian tribes.

The State of Montana and all the private petitioners have recognized the existence of federal reserved water rights, and the fact that federally created rights must be determined in accordance with federal law while state created rights will be determined in accordance with state law. *See, United States v. District Court of Eagle County*, 401 U. S. 520, 525-26 (1971); *United States v. District Court in and for Water Division No. 5*, 401 U. S. 527, 529-30 (1971). The State of Montana has asserted only its legitimate governmental interests in attempting to adjudicate federal reserved water rights, including Indian water rights.

As is argued in Part III of this Petition, the State's interest is in completing a general state-wide adjudication of *all* rights, which must include all federal and Indian reserved rights in order to be effective. The Ninth Circuit has held, contrary to all existing case law, and statutory authority, that the State of Montana has no jurisdiction to regulate Indian water rights in any way.[5] The court based its opinion upon an incorrect and unprecedented interpretation of Montana's Constitution and the

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[5]The Ninth Circuit opinion assumes throughout that the state courts will not give Indians and Indian tribes a "fair shake" in the adjudication of their water rights—a concept which this Court expressly rejected in *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 812 (1976). *See also, State of South Dakota ex rel. Meierhenry v. Rippling Water Ranch, Inc.*, 531 F. Supp. 449, 454 (D. S. D. 1982).

Enabling Act under which Montana was admitted to the Union, 25 Stat. 676, § 4, cl. 2.[6]

The Enabling Act required Montana to include in its constitution a disclaimer by the people of Montana to the lands[7] owned by Indians or Indian tribes and an acknowledgement that those lands were to remain "under the absolute jurisdiction and control of" Congress until the title of the Indians or of the United States had been extinguished. Montana enacted its disclaimer of authority over Indian lands as part of its original State Constitution (Mont. Const. ord. no. 1, cl. 2 (1889)) and as part of its new Constitution. Mont. Const. art. I (1972).[8]

For almost one hundred years, this Court has made clear that the "absolute jurisdiction and control" language contained in Montana's disclaimer does not mean "exclusive" federal jurisdiction. *See, e. g., Draper v. United States*, 164 U. S. 240 (1896), interpreting Montana's disclaimer language. This Court has held that similar disclaimer language includes only proprietary interests, but

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[6]This Enabling Act included Montana, Washington, North Dakota and South Dakota.

[7]Petitioners have never conceded that "lands" include water. That distinction, however, is not the subject of conflict between the circuit courts and this Court.

[8]Arizona, Idaho, New Mexico, Utah, and Wyoming have enabling acts or constitutional disclaimers essentially identical to the Enabling Act for Montana, North Dakota, South Dakota and Washington. *See* New Mexico and Arizona Enabling Acts, Act of June 20, 1910, 36 Stat. 557; Idaho Const. art. 21, sec. 19, ratified by Congress, 26 Stat. 215 (1890); Wyo. Const. art. 21, sec. 26, ratified by Congress, 26 Stat. 222 (1890); Utah Enabling Act, 28 Stat. 107, 108 (1894). *See also*, Oklahoma Enabling Act, 34 Stat. 267 (1906); Alaska Enabling Act, 72 Stat. 339 (1958), as amended by 73 Stat. 141 (1959).

that the state continues to have governmental interests. *Organized Village of Kake v. Egan*, 369 U. S. 60 (1962). This holding has not been disturbed by this Court.

The Ninth Circuit's opinion has rejected this Court's interpretation of disclaimer provisions. In addition, the Ninth Circuit's opinion is in direct conflict with the opinion of the Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*, 601 F. 2d 1116 (10th Cir. 1979), *cert. denied*, 444 U. S. 995 (1979). In that case, the Tenth Circuit held that language in a state disclaimer is not intended to oust the state from regulation of Indian property, and that disclaimer states, such as Montana, have jurisdiction under the terms of the McCarran Amendment, 43 U. S. C. § 666,[9] to adjudicate all federal water rights, including Indian reserved water rights. The Ninth Circuit held that the Tenth Circuit's decision erroneously ignored the distinction between the states with disclaimer provisions and those without them. *Adsit* (App. C at 35). The court held that the disclaimer provisions in Montana's Enabling Act barred Montana from exercising jurisdiction over Indian water rights.[10] In construing the disclaimer provisions, the Ninth Circuit made no distinction between the proprietary interests and

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[9]The McCarran Amendment (quoted in its entirety in "Constitutional Provisions and Statutes Involved" above) waives the immunity of the United States in suits to adjudicate water rights.

[10]As noted in the "Statement of the Case," *supra*, the Ninth Circuit Opinion was inexplicably silent on the issue of Montana's jurisdiction to adjudicate other federal water rights which were at issue in the case. The opinion apparently confused Indian water rights with all other federal reserved water rights.

governmental functions long recognized by this Court (*Organized Village of Kake, supra*), and by the Ninth Circuit itself in *White Mountain Apache Tribe v. Arizona*, 649 F. 2d 1274 (9th Cir. 1981). In the present case, the Ninth Circuit stated that the Tenth Circuit went "too far by relying on the distinction between proprietary and governmental functions drawn in *Kake* and *White Mountain Apache Tribe*." *Adsit* (App. C at 38). Curiously, the Ninth Circuit overlooked the fact that the Tenth Circuit opinion in *Jicarilla, supra*, was issued more than a year *before* the Ninth Circuit decision in *White Mountain Apache Tribe v. Arizona*. The *Jicarilla* decision did not and could not possibly have relied upon *White Mountain*. In fact, in *White Mountain*, the Ninth Circuit relied on *Jicarilla* for the very proposition that the same court in *Adsit* impliedly reversed, namely, that proprietary interests only were disclaimed in disclaimer provisions. *See, White Mountain Apache Tribe v. Arizona*, 649 F. 2d at 1280.

In justifying its express disagreement with the Tenth Circuit's decision in *Jicarilla*, the Ninth Circuit asserted that there was no other case brought to its attention permitting a disclaimer state to adjudicate Indian water rights. *Adsit* (App. C at 35). This is not true. The case of *State ex rel. Reynolds v. Lewis*, 88 N. M. 636, 545 P. 2d 1014 (1976), was brought to the Ninth Circuit's attention in at least two briefs. Br. of Cale Crowley, at

17-18; Opening Br. of Northern Cheyenne Tribe at 34, n. 33.[11]

The holding of the Ninth Circuit in this case, in contravention of the holdings of this Court and every other court which has dealt with the disclaimer issue, is underscored by the position of the Solicitor General for the United States as stated to this Court in his amicus brief filed in *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980). In that case, the White Mountain Apache Tribe argued that Arizona's disclaimer provisions prohibited the state from imposing any taxes upon Indians or those doing business with Indians. In his brief, the Solicitor General conceded that the contention that the Arizona disclaimer provisions (essentially identical to Montana's) included a disclaimer of all governmental interests and jurisdiction was a "settled question" which did "not warrant review by this Court." Br. U. S. as *Am. Cur.* 12-13. Certiorari was not granted on that issue. Apparently, the United States still does not subscribe to the position urged by the Tribes and adopted by the Ninth Circuit in this case. The United States asked for and received an order "clarifying" the opinion of the Ninth Circuit so that the disclaimer argument was attributed only to the Tribes and not to the United States (App. D).

The extraordinary conclusion of the Ninth Circuit that disclaimer states have no governmental authority within

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[11]Recently, the Superior Court for the State of Washington issued a memorandum opinion holding that federal water rights, including those reserved for the Yakima Indian Nation, can be adjudicated in the state proceedings. *The State of Washington, Department of Ecology v. Acquavella*, Superior Court for the State of Washington for Yakima County, No. 77-2-01484-5 (February 16, 1982).

Indian reservations with regard to water rights should be reviewed by this Court.

II. The Ninth Circuit's decision conflicts with this Court's interpretation of the McCarran Amendment and Public Law 280 in Colorado River Water Conservation District v. United States and with the Tenth Circuit's decision in Jicarilla Apache Tribe v. United States.

The Ninth Circuit's holding that the McCarran Amendment did not apply to disclaimer states and its interpretation of Public Law 280 ignores the holdings of this Court and is in complete conflict with the Tenth Circuit in *Jicarilla Apache Tribe v. United States, supra.*

The McCarran Amendment was enacted by Congress to allow the joinder of the United States as a defendant in state court water adjudication proceedings. Congress recognized that unless it removed the immunity of the United States from suit, state court decrees were ineffective as to the water rights held by the United States, S. Rep. 755, 82nd Cong. 1st Sess. 2-5 (App. J at 146-153). The McCarran Amendment "was introduced for the very purpose of correcting this situation and the evil growing out of such immunity." S. Rep. 755 at 5 (App. J at 153). The problem was significant to the "western states" (the bulk of which are disclaimer states)[12] because they had adopted

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[12]Of the states west of the 100th Meridian (without question "Western States") Washington, Idaho, Montana, Wyoming, Utah, New Mexico, Arizona and Alaska are disclaimer states. Alaska and Hawaii were territories in 1952 when the McCarran Amendment was passed.

the doctrine of prior appropriation and because at least one-third of each western state is federal land.[13]

Although Congress designed the Amendment to include all western states, including these disclaimer states, the Ninth Circuit opinion limits the McCarran Amendment's application to non-disclaimer states: Oregon, California, Colorado and Nevada. This holding eviscerates the Amendment and is in complete conflict with the Tenth Circuit's holding in *Jicarilla Apache Tribe v. United States, supra.*[14]

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[13]

STATE	FEDERAL LANDS (Excluding Trust Lands) (Acres)*	INDIAN TRUST LANDS (Acres)**	PERCENTAGE OF TOTAL STATE LANDS
Alaska	326,925,560.5	426,765.3	89.57
Arizona	32,014,276.1	19,897,231.8	71.42
California	46,702,125	572,771.07	47.18
Colorado	23,670,946.5	755,956.5	36.74
Idaho	33,759,571.6	826,602.8	65.34
Montana	27,740,572.2	5,215,978.67	35.33
Nevada	60,506,114.1	1,154,298.2	87.75
New Mexico	25,873,744.7	7,449,187.4	42.85
Oregon	32,313,687.9	758,537.34	53.69
Utah	33,529,967.4	2,283,986.7	67.96
Washington	12,472,703.7	2,498,293.5	35.07
Wyoming	30,329,555.5	1,887,914.1	51.68

*Source: Bureau of Land Management, U. S. Dep't of Interior, *Public Land Statistics* 1980.

**Source: Bureau of Indian Affairs, U. S. Dep't of Interior, *Annual Report of Indian Lands* (1980).

[14]There is no authority supporting the Ninth Circuit opinion. In *Colorado River Water Conservation District, supra,* this Court held that by naming the United States as a defendant a state may assert jurisdiction over the water rights of Indian tribes which would have been immune from suits in state court absent the McCarran Amendment. 424 U. S. at 812. There is nothing

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The Ninth Circuit opinion ignored the holdings of this Court with regard to the application of "Public Law 280," Act of August 15, 1953, 67 Stat. 589, 25 U. S. C. §§ 1322 *et seq.* Public Law 280 became law in 1953, over a year *after* enactment of the McCarran Amendment. It facilitates the transfer of civil and criminal jurisdiction over Indian country to states if certain procedures are followed. *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U. S. 463, 490-91 (1979). There are some restrictions on this possible assumption of jurisdiction, however, making Public Law 280 completely inapplicable to the adjudication of water rights. 25 U. S. C. § 1322(b) states that:

> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

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in *Colorado River* requiring (or even suggesting) that the opinion be limited to non-disclaimer states, *i. e.*, Colorado, California, Nevada and Oregon. In fact, in *Colorado River*, this Court, discussing procedures to solve problems of water allocation in the Southwest, referred to the water adjudication procedures established by various states, including Arizona and New Mexico, both disclaimer states, without distinguishing them from Colorado. 424 U. S. at 804, n. 2.

The Ninth Circuit's decision overlooked this express language making Public Law 280 inapplicable to the adjudication of water rights, and erroneously held that Montana could have assumed jurisdiction over Indian water rights had the State followed the procedures set forth in Public Law 280.[15] The Ninth Circuit reasoned that Montana's failure to follow those procedures left the State without any jurisdiction to adjudicate the Indian water rights in issue.

The Ninth Circuit's own previously consistent position had been that the law affecting those areas excluded or restricted from the otherwise general extension of jurisdiction by Public Law 280 remained as it existed prior to passage of Public Law 280. In fact, that was the holding of this Court in *Bryan v. Itasca County*, 426 U. S. 373 (1976). Thus, the law affecting state jurisdiction over Indian water rights as it existed prior to passage of Public Law 280 is defined by the pre-existing McCarran Amendment. In *Bryan*, this Court cited with approval the Ninth Circuit's decision in *Kirkwood v. Arenas*, 243 F. 2d 863, 865-866 (1957). *Bryan v. Itasca County*, 426 U. S. at 391. The Ninth Circuit had consistently followed the rationale of *Bryan* until its decision in this case. *See, e. g., White Mountain Apache Tribe v. Arizona, supra*, 649 F. 2d at 1279; *Fort Mojave Tribe v. County of San Bernardino*, 543 F. 2d 1253, 1257 (9th Cir. 1976).

In addition to being in direct conflict with this Court's interpretation of the effect of Public Law 280 in *Bryan*,

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[15]The petitioners have never contended that it is possible for the State to obtain jurisdiction over Indian water rights pursuant to Public Law 280.

the decision of the Ninth Circuit is in conflict with the express language of this Court in *Colorado River Conservation District, supra.* In that case, this Court stated:

> . . . This provision in both sections [Public Law 280, 25 U. S. C. § 1322(b) and 28 U. S. C. § 1360(b)], however, only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment. A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of the enactment. [citation omitted] 424 U. S. at 812-813 n. 20.

This language was given special emphasis by the Tenth Circuit in *Jicarilla, supra,* 601 F. 2d at 1132, and the Tenth Circuit there correctly held that a state's jurisdiction to adjudicate water rights remains as it existed prior to the enactment of "Public Law 280", and as defined by the McCarran Amendment.

The Ninth Circuit's refusal to follow the holdings of this Court and its conflict with the holding of the Tenth Circuit on the effect of Public Law 280 and the McCarran Amendment on state courts' jurisdiction to adjudicate Indian water rights justify review by this Court.

III. The Ninth Circuit opinion conflicts with this Court's holding in Colorado River Water Conservation District v. United States that the McCarran Amendment grants state courts jurisdiction to adjudicate Indian water rights in general stream adjudications.

The Ninth Circuit Court of Appeals stands alone in failing to recognize the clear purpose of the McCarran Amendment was to provide for a comprehensive adjudication of all rights within a water system, and to permit adjudication of those rights in the state courts. *See* S. Rep. 755, 82nd Cong. 1st Sess. The decision of the Ninth Circuit requires that Indian water rights be adjudicated in federal court at the same time as non-Indian water rights are being adjudicated under Montana's Water Use Act. The question of which was the proper forum for the adjudication of non-Indian federal reserved water rights was not addressed by the Ninth Circuit. The Ninth Circuit opinion thus requires Montanans, including all of these petitioners, to participate in piecemeal adjudications—the malady which the McCarran Amendment was designed to cure. The Ninth Circuit's holding is contrary to this Court's holding in *Colorado River, supra,* in which this Court stated:

> . . . a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. 424 U. S. at 819.

Similarly, the Ninth Circuit stands alone in its refusal to recognize that the policy underlying the McCarran Amendment is that state adjudication procedures and state courts should be used for the adjudication of all federal water rights, including Indian water rights. This Court has consistently recognized that deference should be given to state water adjudication systems. *Id. See also United States v. New Mexico,* 438 U. S. 696, 702 (1978). The Montana Water Use Act (App. F, G) is

precisely the type of water adjudication process which Congress envisioned in passing the McCarran Amendment. S. Rep. 755 at 5 (App. J at 154).

Finally, the Ninth Circuit opinion is contrary to the holding of this Court in *Colorado River* because it failed to recognize that the extraordinary circumstances warranting dismissal of the federal cases exist here. This Court in *Colorado River* outlined the factors which must exist before a district court may properly dismiss this type of case. The district court exercised its discretion in ruling that all of those factors were present. The Ninth Circuit failed to give proper deference to the district court's discretion because the Ninth Circuit refused to recognize the existence of those factors, including the paramount factor of the McCarran Amendment and its policies.

IV. The Ninth Circuit opinion raises serious and recurring problems concerning efforts by the states to adjudicate water rights.

Various courts have struggled with the issues now before this Court, many very recently.[16]

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[16]The Ninth Circuit opinion consolidated the seven cases from Montana which involved thousands of defendants. Argued on the same day, but not consolidated with the Montana cases, were several cases from Arizona, which had opinions issued one and two days after the *Adsit* opinion: *San Carlos Apache Tribe of Arizona v. The State of Arizona*, 668 F. 2d 1093 (February 23, 1982); *Navajo Nation v. United States*, 668 F. 2d 1100 (9th Cir., February 24, 1982). *See also, The State of Washington, Department of Ecology v. Acquavella*, Superior Court for the State of Washington for Yakima County, No. 77-2-01484-5 (February 16, 1982); *Rippling Water Ranch, supra.*

In 1951 Congress recognized that:

> It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State Courts. S. Rep. 755 at 5 (App. J at 153).

It was this recognition that was the impetus behind the McCarran Amendment.

The Ninth Circuit opinion has eviscerated the McCarran Amendment and, as discussed in Part III above, has required piecemeal water rights adjudications. Not only are these petitioners inconvenienced and caused great expense by having to assert their water rights in both federal and state courts, but every water claimant is relegated to uncertainty about his water rights. The determination of one court will generate litigation in another court. The result is perpetual litigation and the chaos which Congress envisioned in the absence of the McCarran Amendment.

This piecemeal litigation problem faces water claimants in all nine of the states within the Ninth Circuit. The uncertainty afflicts water claimants in the six states making up the Tenth Circuit and seven states making up the Eighth Circuit. Illustrative of the problem is the crisis facing the State of Wyoming in *In Re: The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming*, Civil No. 4993, Fifth Judicial District, State of Wyoming, in which the state courts are attempting to adjudicate

all water rights, including federal reserved water rights. The State of Wyoming has recognized that the conflict between the Ninth and Tenth Circuits on the question of whether state courts can adjudicate federal reserved water rights must be resolved in order to assure that the state courts have subject matter jurisdiction. The State of Wyoming has asked that this question be certified to the Wyoming Supreme Court, in an effort to bring its case before the United States Supreme Court.

The confusion facing water claimants in all of these states can only be cured by a final determination by this Court. Only by reviewing this case will these crucial issues be settled.

CONCLUSION

For all these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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